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No. 81-2101

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

PENNHURST STATE SCHOOL AND HOSPITAL et al.,
Petitioners,

v.

TERRI LEE HALDERMAN, et al.,
Respondents.

ON CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONERS' OPPOSITION TO HALDERMAN RESPONDENTS' PETITION TO DISMISS CERTIORARI AS IMPROVIDENTLY GRANTED

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Relying on an Order of the district court dated August 26, 1983, the Halderman respondents have filed their second Motion to Dismiss Certiorari as improvidently granted. (The first motion was denied on October 12, 1982.) This new motion has no more merit than the first one.[1/]

We take this view for several reasons. First, the August 26 Order has no bearing whatsoever on the primary issues regarding the Eleventh Amendment and comity, the very issues on which the

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1/ To put this Motion in historical perspective, we note that it is but one in a series of efforts by Halderman respondents to evade review on the merits. As we point out in the text, they have now filed two motions to dismiss since certiorari was granted for the second time in June, 1982. Previously, they sought to dismiss certiorari as improvidently granted at the time of the initial review by this Court. Brief for Halderman Respondents, No. 79-1404. In the related contempt case, now pending before the Court, they have opposed certiorari on the ground that a subsequent order makes the case moot. Halderman Brief in Opposition No. 81-2363. The Halderman respondents have also filed numerous motions to dismiss appeals in the Third Circuit. See C.A.3, Nos. 81-2381, 82-1147, 82-1280.

Court has asked for reargument. As its own terms make clear, the Order fully reflects the mandate from the Third Circuit to create and favor community facilities over larger-scale institutions, regardless of the preferences of state officials or the extent and type of funding provided by the state legislature. Our principal argument, of course, is that the Eleventh Amendment and principles of comity prevent a federal court from imposing such a mandate in the first place, when its basis is simply the opinion of the federal court about state law. Second, even with regard to the issue of implementing this improper mandate, the Order scarcely demonstrates an appropriate deference to state efforts. Rather, the Order continues to exalt the role of the federal court at the expense of state officials.

1. The Order Has No Affect On the Core Issues Regarding the Eleventh Amendment and Principles of Comity

The primary issues raised by the petition and the briefs for petitioners, and the issues to be addressed on reargument, are whether a federal court, consistently with the Eleventh Amendment and principles of comity, may order state officials to revamp state programs with state funds solely on the basis of its reading of state law. These issues arise in this case from a judgment of the Third Circuit requiring state officials to move all class members from state institutions into community facilities that must be created by the state unless the class members can overcome a court-fashioned presumption in favor of community care. Because this relief necessarily operates against the state itself (and not its officials personally), and because the principles of federal supremacy set forth in Ex Parte Young, 209 U.S. 123 (1908), are not applicable here, we believe that the Eleventh Amendment bars such an order or, at the least, that principles of comity should be held to do so.

The August 26 Order has no effect at all on these issues. Indeed, the entire thrust of the Order is to make clear that placement of retarded persons must be undertaken in accordance with the wishes of the federal court. Thus, the very first

paragraph embodies an injunction "to provide suitable community living facilities" and related community services for every class member. August 26 Order, ¶1, at 1-2. A later paragraph orders the state and county petitioners "to assure that community living facilities and other community services of the necessary quantity and quality are provided and maintained." August 26 Order, ¶3, at 2a. Still another paragraph requires a plan showing the quantity and type of community living facilities "necessary for the habilitation of all plaintiffs in the least separate, most integrated, least restrictive community setting," as well as "[s]ources and anticipated or available amounts of funding ***." August 26 Order, ¶5, at 3. The State is given little or no discretion with regard to these matters.

Turning to the other side of the coin, the district court with certain exceptions further prohibits the defendants from, among other things, "recommending or in any way counseling that any individual be committed or admitted to Pennhurst, and from petitioning for the commitment of any individual to Pennhurst***." August 26 Order, ¶39, at 33. In the following paragraph, the Order extends the same prohibition to cover admission to "any institution operated by the Commonwealth defendants." August 26 Order, ¶40, at 37. These directives, which again embody the judgment of the Third Circuit now before this Court, are unmistakeably intended to control the discretion of Pennsylvania officials upon pain of contempt.

This degree of control is, in fact, driven home again and again in the Order. Whatever the state officials might otherwise prefer, the Order requires that every Individual Habilitation Plan provide for habilitation "in an appropriate community living facility." August 26 Order, ¶35 at 27-28. Although a class member (or a parent, guardian, or advocate) may object, a Hearing Master or the Court (not state officials) makes the final decision, "guided by the presumption in favor of placing individuals in community living facilities, as set forth by the Court of Appeals for the Third Circuit." August 26 Order, ¶38,

at 31 (emphasis added). Should anyone object to the Court-ordered denial of admission to Pennhurst, the Hearing Master or Court again makes the final decision "guided by the presumption" mandated by the Third Circuit. August 26 Order, ¶39, at 36. The Order further makes plain that, while the state must pay for the Master, his staff, his office, and his expenses, the Master Order, ¶36, at 28.

It is, in short, fatuous for respondent Halderman to say that the essence of our petition " - that a federal court is intruding on state processes - is reduced to the point of extreme tenuousness." Petition to Dismiss at 3. To the contrary, as even a cursory reading of the Order shows, the federal courts have deprived the state of control over the most basic of choices regarding care and treatment: that is, where the care and treatment shall be provided.2/ In establishing and implementing the state programs, neither the legislature nor the state officials in charge of their operation have ever barred retarded persons from state institutions or insisted upon wholesale transfer of residents to community facilties. The enforcement of that judicial requirement thus will literally restructure the entire system of state care and treatment for the mentally retarded. If the system preferred by the Court turns out to be unwise, or unworkable, or prohibitively expensive, it is the State and its retarded citizens that must bear the consequences.

Our position thus remains absolutely unchanged by the August 26 Order. This state-law claim, ordering state officials to create new facilities and relocate retarded persons according to judicial direction, is in fact a claim against the state. While state officials are nominal defendants, the claim is directed against conduct within the ambit of their official duties and requires affirmative relief from the state itself. Whereas some similar claims are permitted against state officials under

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2/ The choice of facilities, in turn, has obvious effects on staffing, programming, security, interraction with others - indeed the full range of choices regarding care and treatment of the mentally retarded.

federal law, because "[t]he State has no power to impart to [a state official] any immunity from responsibility to the supreme authority of the United States" (Ex Parte Young, supra, 209 U.S. at 160), no such "supreme authority" strips the state and its officials of immunity from state-law claims.3/ In seeking and obtaining passage of the Eleventh Amendment, which after all contains a flat bar against all suits in law or equity, the states can hardly have planned to make themselves subservient to federal courts in the implementation of their own laws.

2. The Order Is Overbearing and Intrusive

Although the August 26 Order does have some bearing on the issue of the Master (the third issue raised in the petition and briefs), it does not have the effect that the Halderman respondents suggest.4/ Far from "granting new and extraordinary deference to State and County defendants' discretion" (Petition to Dismiss at 1), the Order embodies an infrastructure that gives the Hearing Master exceptional powers and makes a voluntary state group (the Special Management Unit) into a virtual agent of the Court.

Because the August 26 Order demonstrates on its face the degree of judicial control, we will not review its provisions in detail. For present purposes, it is enough to note that the Hearing Master and then the Court have final authority to decide (following the presumption set forth by the Third Circuit) whether a class member must move to a community facility or may remain or be admitted to an institution. August 26 Order, ¶¶38-

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3/ Immunity under the Eleventh Amendment is not forfeited simply because plaintiffs make the barred claim a pendent claim. See Edelman v. Jordan, 415 U.S. 651 (1974). If the claim is in fact an impermissible one against the state, the basis of jurisdiction makes no difference.

4/ The changes occasioned by the August 26 Order are largely, if not exclusively, intended to reflect the Order of August 12, 1982 (regarding termination of the Special Master), on which respondent Halderman's next most recent motion to dismiss was based. The earlier Order did not afford a sufficient basis for discussing certiorari, and this derivative Order affords no more.

40, at 30-40. Indeed, the Hearing Master may even order petitioners to place residents in a different community facility from the one proposed. August 26 Order, ¶38, at 32-33. Thus, petitioners not only must work under the weight of a judicially-imposed presumption but must have their application of that presumption controlled by a Master and, ultimately, the Court itself.

We also note that, while certain duties of the Special Master have been transferred to the state Special Management Unit, that transfer is a mixed blessing. As the price for allowing the Unit to assume certain responsibilities, the Court has imposed on that Unit other responsibilities of its own choosing and has limited the State to assigning it "non-conflicting duties and responsibilities." August 26 Order, ¶18, at 19-20. The result is that a group set up by the State for its own purposes is now an entrenched part of the Court plan for implementing Court orders, with state authority over that group reduced to a secondary role. Once again, the judicial intrusion into state affairs is significant.

Finally, we think it relevant that, in an Order issued three days after the Order emphasized by respondents, the district court directed petitioners to submit "plans to provide community living facilities *** for retarded persons in the Southeast Region of Pennsylvania who are not members of the Pennhurst plaintiff class ***." August 29 Order (attached hereto as Appendix A), at 1 (emphasis added). In overseeing state programs, therefore, the Court has taken upon itself to review plans of persons not even under the jurisdiction of the court "to determine whether these plans are appropriate and consistent with the injunctive relief previously ordered by this Court." August 29 Order, at 2. This broad exercise of power would seem more appropriate to an executive position than to a judicial one.

Petitioners have already been subject to one judgment,

based on the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§6000 et seq. (see 451 U.S. 1 (1981)), that was reversed by this Court. If the present judgment is likewise invalid, as we believe to be, this Court should reverse it as well, so that the State can operate its mental retardation program without improper interference from a federal court. The motion to dismiss certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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Dated: September 12, 1983

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